STATE OF MICHIGAN

COURT OF APPEALS

LAURA LEE REESOR,

Plaintiff-Appellant,

v

NORMAN YATOOMA & ASSOCIATES, P.C.,

Defendant-Appellee.

UNPUBLISHED
May 13, 2010

No. 289400
Oakland Circuit Court
LC No. 2007-083023-NM

NORMAN YATOOMA & ASSOCIATES, P.C.,

Plaintiff-Appellee,

v

LAURA LEE REESOR,

Defendant-Appellant.

No. 289427
Oakland Circuit Court
LC No. 2007-083056-CK

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Following a jury trial, defendant Laura Lee Reesor appeals as of right from a judgment in favor of plaintiff Norman Yatooma & Associates, P.C., (NYA) in its action for breach of contract and account stated. We affirm.

Reesor's property was the subject of a condemnation lawsuit that commenced in 2000 by Vector Pipeline. Ultimately, the litigation was resolved through a settlement agreement. However, in 2003, the pipeline company initiated additional legal action against Reesor. With discovery nearly complete and case evaluation scheduled, Reesor retained NYA to represent her in the action. NYA engaged in discovery and prepared the case evaluation summary. Although Reesor wanted to challenge jurisdiction and move the case to federal court, NYA advised that the best option would be to continue the state action because not all of the claims could proceed in federal court. Reesor paid a retainer fee, but did not make any additional payments toward her legal fees. Consequently, NYA withdrew from its representation of Reesor in the pipeline action. Reesor proceeded to represent herself, but the pipeline succeeded in its claims against her. This action commenced when Reesor filed a legal malpractice action against NYA. NYA

filed its own action against Reesor, alleging breach of contract and account stated, and the cases were consolidated. The trial court granted NYA's motion for summary disposition of the legal malpractice action after Reesor failed to retain an expert to support her claim. The trial court also granted NYA's motion for summary disposition of the breach of contract action, but allowed Reesor to dispute the reasonableness of the legal fees at trial. The jury rendered a verdict in favor of NYA, and Reesor appeals as of right.

First, Reesor contends that the contract for legal services violates public policy and is void. "An issue is not properly preserved for appeal if not raised in the circuit court, and we need not address arguments first raised on appeal." *Green v Ziegelman*, 282 Mich App 292, 300-301; 767 NW2d 660 (2009). We will review an unpreserved issue when it is necessary for a proper determination of the case, the question at hand is one of law, and all necessary facts have been presented. *Detroit Free Press, Inc v Family Independence Agency*, 258 Mich App 544, 555; 672 NW2d 513 (2003). The construction and interpretation of a contract presents a question of law that is reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). In response to NYA's motion for summary disposition, Reesor did not challenge the validity of the legal services agreement and did not file her own motion for summary disposition contesting the legality of the contract. Accordingly, this issue is not preserved for appellate review. However, because the issue involves a question of law for which all necessary facts have been presented, we will address it. *Detroit Free Press*, 258 Mich App at 555.

"[A] court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable." *Rory v Continental Ins Co*, 473 Mich 457, 489; 703 NW2d 23 (2005). An unambiguous contractual provision must be enforced as written unless the provision would violate law or public policy. *Id*. at 470. Public policy will not restrain enforcement of a contractual provision unless the policy is explicit, well defined, and dominant. *Terrien v Zwit*, 467 Mich 56, 67-68; 648 NW2d 602 (2002). The only way to properly ascertain public policy is to examine the laws as reflected in the constitutions, statutes, common law, administrative rules and regulations, and rules of professional conduct. *Id*. at 67, n 11. A partial illegality does not render the whole contract void when the sound part can be separated from the unsound. *Smilansky v Mandel Bros*, 254 Mich 575, 581-582; 236 NW 866 (1931). "A general rule of contract law is that a void section of an otherwise valid provision can be severed if it is not an essential part of the whole." *Peeples v Detroit*, 99 Mich App 285, 296; 297 NW2d 839 (1980).

Reesor contends that the legal services contract with NYA violated public policy because it was a hybrid agreement allowing for both an hourly charge for services rendered and a one-third contingency fee. In support of her argument that the contract violated public policy, Reesor relies on State Bar of Michigan Informal Ethics Opinion RI-6 (May 19, 1989). Informal ethics opinions address circumstances of restricted and individual relevance, and therefore, the opinions are not binding on this Court. *Watts v Polaczyk*, 242 Mich App 600, 607; 619 NW2d 714 (2000). The informal ethics opinion merely provides that a fee agreement may contain both an hourly rate and a percentage of net recovery as long as the ultimate fee remains reasonable. In the present case, the contingent fee provision of the legal services contract was never invoked because NYA withdrew from its representation before the underlying case was resolved. Moreover, even assuming without deciding that the contingent fee provision was improper, that

aspect of the legal services contract is severable from the remainder of the contract. *Peeples*, 99 Mich App at 296. Accordingly, this issue does not provide Reesor with appellate relief.[1]

Next, Reesor challenges the trial court's application of the court rules in denying her motion for default, for an alternative sanction, and for reconsideration. The trial court's decision regarding a default judgment is reviewed for an abuse of discretion. *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). A trial court's ruling regarding a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). The trial court's decision regarding the imposition of discovery sanctions is also reviewed for an abuse of discretion. *Richardson v Ryder Truck Rental*, 213 Mich App 447, 450; 540 NW2d 696 (1995). An abuse of discretion occurs only when the decision falls outside the range of reasonable and principled outcomes. *Saffian*, 477 Mich at 12. When the discovery sanction results in a drastic remedy, such as dismissal of an action, the sanction should be exercised cautiously. *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990). Although the rules of practice provide direction regarding the process for administering justice, the application of the rules should not be fixed to such an extent that justice is not done. *Id*. The failure to meet a deadline does not generally justify the imposition of a drastic sanction. *Id*. The sanction of default judgment should only be imposed when there has been a flagrant and wanton refusal to comply with discovery. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994). The trial court's factual findings underlying a discovery ruling are reviewed under the clearly erroneous standard. *Traxler v Ford Motor Co*, 227 Mich App 276, 284-286; 576 NW2d 398 (1998).

Reesor first alleges that entry of a default judgment was proper because NYA failed to cooperate in preparing the joint final pretrial order (JFPO), and that NYA's lack of cooperation and noncompliance with the court rules was a pattern of conduct that occurred throughout discovery. When the parties appeared before the trial court to address the preparation of the JFPO, Reesor asserted that NYA was not cooperating, and NYA disputed that assertion. The trial court denied Reesor's request for a default as a sanction and ordered the parties to meet and resolve the issues. Contrary to Reesor's claims, the trial court did not find that NYA had engaged in a pattern of misconduct designed to thwart discovery. *Thorne*, 206 Mich App at 633. Accordingly, the trial court did not abuse its discretion by denying the request for a default judgment for an alleged lack of cooperation in preparing the JFPO. *Saffian*, 477 Mich at 12. In light of the lack of factual findings in support of alleged noncompliance by NYA, this issue is without merit.

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[1] Within the discussion section of this issue, Reesor asserted that the legal services contract was ambiguous because it did not provide a schedule for billing statements. Reesor further asserted that the contract was ambiguous because it indicated that Norman Yatooma was responsible for handling her representation, but also indicated that any other attorney in the firm could be assigned her case. An issue is not preserved for appeal unless it is raised in the statement of questions presented. *In re Hansen*, 285 Mich App 158, 164-165; 774 NW2d 698 (2009). An issue that is not raised in the statement of questions presented is deemed to be abandoned. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008). Therefore, we do not address these assertions.

Reesor also asserts that the trial court erred by failing to enter a default judgment as a discovery sanction because NYA repeatedly failed to comply with discovery requests or adequately respond to the discovery requests and did not timely respond to her motions. Again, the issue of the timeliness and adequacy of the response by NYA was raised before the trial court, and the trial court did not make factual findings in support of Reesor's assertions. Based on the record available, we cannot conclude that the trial court clearly erred in failing to grant Reesor the relief requested. *Traxler*, 227 Mich App at 284-286.

Also in the context of court rule violations, Reesor alleges that NYA failed to timely file an answer to her second amended complaint, and therefore, the contents of the complaint were admitted. Accordingly, she asserts that the trial court improperly dismissed her legal malpractice action. We disagree. MCR 2.108(C) grants the trial court discretion to schedule different dates for amended pleadings. More importantly, we note that the trial court exercised its discretion regarding timeliness of deadlines with regard to both parties. The trial court allowed Reesor to file her second amended complaint and did not entertain NYA's motions for summary disposition. Additionally, the trial court gave Reesor additional time to retain an expert witness, but she did not comply. In light of the contentious nature of this litigation, we cannot conclude that the trial court abused its discretion by denying Reesor's request. *Dean*, 182 Mich App at 32.

Next, Reesor contends that the trial court erred in granting NYA's motion for summary disposition of her legal malpractice complaint. We disagree. The trial court's decision regarding a motion for summary disposition is reviewed de novo on appeal. *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id*. The nonmoving party may not rely on mere allegations or denials in the pleadings. *Id*. Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

To establish a claim of legal malpractice, a plaintiff must prove (1) the existence of an attorney-client relationship, (2) negligent representation of the plaintiff, (3) the negligence was the proximate cause of the plaintiff's injury, and (4) the fact and extent of the injury alleged. *Mitchell v Dougherty*, 249 Mich App 668, 676; 644 NW2d 391 (2002). To prove proximate cause in a legal malpractice action, the plaintiff must establish that the defendant's action was a cause in fact of the claimed injury. *Charles Reinhart Co v Winiemko*, 444 Mich 579, 586; 513 NW2d 773 (1994). A plaintiff must demonstrate that, but for the attorney's alleged malpractice, he would have succeeded in the underlying suit. A claim of malpractice requires a showing of actual injury, not just the potential for injury. *Colvert v Conybeare Law Office*, 239 Mich App 608, 619-620; 609 NW2d 208 (2000).

When the alleged legal malpractice is the result of the attorney's failure to diligently pursue a client's claim, the proximate cause and damage analysis includes proof that the underlying litigation would have been successful in favor of the plaintiff, but for the attorney's alleged malpractice. *Mitchell*, 249 Mich App at 676. An attorney owes a duty to exercise reasonable skill, care, discretion, and judgment in representing a client, but is not a guarantor of the most favorable possible outcome. *Id*. at 677. An attorney who acts in good faith and with an

honest belief that his acts and omissions are well founded in law and in the best interest of the client, is not answerable for mere judgments in error. *Id*. A bad result, in and of itself, is not sufficient to raise an issue for the jury in a professional negligence action. *Woodard v Custer*, 473 Mich 1, 8; 702 NW2d 522 (2005) (citation omitted). An expert must present evidence that "but for" the negligence, the result ordinarily would not have occurred when such a determination can not be made by the jury as a matter of common understanding. *Id*. The general rule in legal malpractice actions is that expert testimony is required to establish the applicable standard of conduct, the breach of that standard, and causation. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 48; 436 NW2d 70 (1989). "Where the absence of professional care is so manifest that within the common knowledge and experience of an ordinary layman it can be said that the defendant was careless, a plaintiff can maintain a malpractice action without offering expert testimony." *Id*.

In the complaint alleging legal malpractice, Reesor alleged that NYA's representation was deficient because it failed to challenge the jurisdiction of the circuit court, failed to conduct proper discovery, failed to remove the action from case evaluation, failed to file an appropriate case evaluation summary, and failed to communicate regarding the status of the case and decision-making. The challenges raised by Reesor do not fall within the common knowledge and experience of an ordinary layman. *Stockler*, 174 Mich App at 48. Circuit courts have original jurisdiction regarding all civil claims and remedies except where exclusive jurisdiction is vested elsewhere by constitution or statute. MCL 600.605. The challenge to the jurisdiction of the trial court presents a question of law that is reviewed de novo. *Behnke, Inc v State of Michigan*, 278 Mich App 114, 118; 748 NW2d 253 (2008). Additionally, case evaluation is mandated for most tort actions unless the court decides to except an action on motion for good cause shown. MCR 2.403(A)(2). The legal deficiencies alleged by Reesor involved questions of law that an expert would have been required to provide a background regarding the standard of conduct. Therefore, the trial court did not err in granting NYA's motion for summary disposition when Reesor failed to retain an expert testimony to address the standard of conduct.

Lastly, Reesor contends that the trial court erred in allowing attorney Howard Lederman to act as co-counsel at trial and to appear as a witness at trial. We disagree. "The party seeking disqualification bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004) (citation omitted). The trial court's factual findings regarding a motion to disqualify counsel are reviewed for clear error. *Buchanon v Flint City Council*, 231 Mich App 536, 547; 586 NW2d 573 (1998). When addressing the issue of disqualification, the trial court's application of the relevant law to the facts is reviewed de novo. *People v Tesen*, 276 Mich App 134, 141; 739 NW2d 689 (2007).

This issue is not preserved for appellate review because it was not raised, addressed, and decided by the trial court. *Green*, 282 Mich App at 300-301. Reesor contends that this error was only discovered after the completion of the trial, and the trial court had an obligation to preclude the improper representation by Lederman of NYA. An error or omission by the trial court does not present a foundation for granting a new trial, setting aside a verdict, or disturbing a judgment or order, unless the refusal to take such action is inconsistent with substantial justice. MCR 2.613(A); *Jimkoski v Shupe*, 282 Mich App 1, 9; 763 NW2d 1 (2008).

Michigan Rule of Professional Conduct (MRPC) 3.7(a) provides that a lawyer shall not act as an advocate at trial in which the lawyer will also be a necessary witness. The purpose of MRPC 3.7 "is to prevent any problems that would arise from a lawyer's having to argue the credibility and the effect of his or her own testimony, to prevent prejudice to the opposing party that might arise therefrom, and to prevent prejudice to the client if the lawyer is called as an adverse witness, not to permit the opposing party to seek disqualification as a tactical device to gain an advantage." *Tesen*, 276 Mich App at 143. The party seeking disqualification of a lawyer bears the burden of showing that the attorney is a necessary witness. *Id*. at 144. The timing of a motion for disqualification is a relevant inquiry. *People v Petri*, 279 Mich App 407, 419; 760 NW2d 882 (2008). "[T]he timeliness of the motion may be considered in determining the likelihood that the defendant's motion is made in good faith and not just for the purpose of gaining a tactical advantage." *Id*. (citation omitted). A hardship may be created by a disqualification of a lawyer most familiar with the case and the duplication of work by a substitute attorney. *Id*. Similarly, a party may not harbor error as an appellate parachute by assenting to action taken at trial and raising the issue as an error on appeal. *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005).

On the record available, we cannot conclude that the verdict should be set aside. When appearances were placed on the record, Lederman and Robert Zawideh indicated that they were both appearing on behalf of NYA. However, Zawideh gave the opening and closing arguments, questioned the witnesses, and raised objections before the trial court. There is no indication that Lederman acted as an advocate at trial. Rather, his presence was limited to providing testimony regarding the legal work performed in the underlying condemnation action and the reasonableness of the fees and legal services rendered.

Reesor contends that prejudice resulted from the trial court's failure to exclude Lederman from the trial because he engaged in improper conduct with Zawideh during the trial. The record does not substantiate Reesor's assertion of prejudice. Lastly, Reesor contends that Zawideh made improper comments in closing argument. However, Reesor did not object to the closing argument. Additionally, the trial court instructed the jurors that closing argument was not evidence, and Zawideh also told the jury that his closing argument was his interpretation of the facts and the law, but the only evidence to be considered was the testimony taken from the witnesses. Generally, the trial court's instructions that the statements of counsel are not evidence is sufficient to cure the prejudice arising from the improper remarks of counsel. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Moreover, Reesor's citations to the closing argument by NYA's attorney reveal comments on the evidence. Therefore, this issue is without merit.

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood